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**BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Section 703(e) )  
of the Telecommunications Act )  
of 1996 )  
 )  
Amendment of the Commission's )  
Rules and Policies Governing )  
Pole Attachments )

CS Docket No. 97-151

**COMMENTS OF WINSTAR COMMUNICATIONS, INC.**

Timothy Graham  
Robert Berger  
Joseph Sandri, Jr.

**WINSTAR COMMUNICATIONS, INC.**  
1146 19th Street, N.W.  
Suite 200  
Washington, D.C. 20036  
(202) 833-5678

Philip L. Verveer  
Michael F. Finn

**WILLKIE FARR & GALLAGHER**  
Suite 300  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20036  
(202) 328-8000

Attorneys For WinStar  
Communications, Inc.

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## SUMMARY

WIRELESS COMPETITIVE LOCAL EXCHANGE CARRIERS ("CLECS") DEPEND ON ACCESS TO ROOFTOPS TO DELIVER THEIR SERVICES:

- TRAFFIC IS TRANSMITTED AND RECEIVED VIA SMALL ANTENNAS AND PIZZA-SIZED DISHES PLACED ON ROOFTOPS
- WIRELESS CLECS' ABILITY TO OFFER COMPETITIVELY-PRICED SERVICES IS HAMPERED DUE TO AN INABILITY TO OBTAIN ROOFTOP ACCESS ON FAIR TERMS

THE COMMISSION SHOULD INTERPRET THE TERM "RIGHTS OF WAY" BROADLY:

- ALL ACCESS RIGHTS HELD BY THE UTILITY MUST BE AVAILABLE TO TELECOMMUNICATIONS CARRIERS UNDER SECTION 224 - WHENEVER A UTILITY MAY ACCESS A BUILDING, ROOFTOP, ETC., SO TOO MAY A TELECOMMUNICATIONS CARRIER
- SUCH DEFINITION WILL PERMIT WIRELESS CLECS TO FLOURISH THEREBY INTRODUCING VIBRANT COMPETITION TO THE LOCAL LOOP

THE TERM "RIGHTS-OF-WAY":

- IS A RIGHT TO PASS OVER, UNDER OR THROUGH LAND, BUILDINGS, AND OTHER PROPERTY BY EASEMENT, FEE SIMPLE, OR OTHERWISE
- EASEMENTS ARE COMMONLY GRANTED TO PERMIT ENTITIES TO ACCESS BRIDGES, BUILDINGS, ETC.
- EASEMENT HOLDERS MAY STRING WIRES, PLACE ANTENNAS, ETC., IN THE RIGHT-OF-WAY

THE COMMISSION MUST SET FORTH A METHODOLOGY TO CALCULATE JUST AND REASONABLE RATES FOR ACCESS TO RIGHTS-OF-WAY:

- THE COMMISSION HAS RECOGNIZED THAT AD HOC COMPLAINT SYSTEMS PERMIT MONOPOLISTS TO TAKE ANTICOMPETITIVE ACTS
- A FORMULA WOULD FACILITATE NEGOTIATIONS OVER PRICE THEREBY PROVIDING SWIFT ACCESS TO RIGHTS-OF-WAY

THE RIGHTS-OF-WAY FORMULA MUST ENSURE THAT PRICES ARE JUST AND REASONABLE AND NONDISCRIMINATORY:

- RATES MUST BE COST-BASED
- A TELECOMMUNICATIONS CARRIER SHOULD PAY NO MORE THAN ITS PROPORTIONATE SHARE OF THE UTILITY'S COST OF MAINTAINING THE RIGHT-OF-WAY

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Pole Attachments	)	

**COMMENTS OF WINSTAR COMMUNICATIONS, INC.**

WinStar Communications, Inc. ("WinStar")<sup>1</sup> hereby submits its  
Comments in the above-captioned proceeding.<sup>2</sup>

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<sup>1</sup> WinStar holds the largest amount of 38 GHz spectrum in the United States which it is using to roll out a ubiquitous, facilities-based wireless telecommunications network for the transmission of voice, data, and video traffic. To that end, WinStar has received authority to operate as a competitive local exchange carrier ("CLEC") in twenty-seven jurisdictions and as a competitive access provider in thirty-six. WinStar offers switched commercial service as a CLEC in New York City, Chicago, Los Angeles, Boston, Dallas, Washington, D.C., San Diego, and Newark and expects to be operating shortly in twelve other major market areas. As of September 1, 1997, WinStar had forty carrier customers, including: Ameritech Cellular Services, MCI Communications, Pacific Bell, and Teleport Communications.

<sup>2</sup> Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Notice of Proposed Rulemaking, FCC 97-234 (rel. August 12, 1997) ("Notice").

## I. INTRODUCTION.

As a wireless CLEC, WinStar is dependent on access to rooftops, risers, and inside wiring in order to deliver its services to building tenants and residents. Using pizza-sized dishes placed on four-foot antenna poles, WinStar is able to utilize spectrum in the 38.6-40.0 GHz band to transmit large amounts of traffic from location to location. From the rooftop, the wireless traffic is transmitted through wireline (generally coaxial cable) to terminating equipment and channel banks located inside the building.<sup>3</sup>

WinStar's growth as a facilities-based competitor in the local exchange has been hampered by an inability to obtain access to rooftops on fair terms. As detailed in WinStar's comments in CS Docket 95-184, many landlords or building owners have been exercising their monopoly power when leasing rooftop space.<sup>4</sup> Without reasonable access to rooftops,<sup>5</sup> WinStar -- and presumably other wireless carriers -- are precluded from offering competitively-priced services to building tenants and residents.

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<sup>3</sup> See WinStar Comments in CS Docket No. 95-184, *Telecommunications Services Inside Wiring* (Aug. 5, 1997) ("WinStar Inside Wiring Comments").

<sup>4</sup> Id.

<sup>5</sup> Many of the offers made by building owners for rooftop access have been unreasonable. An offer to deal on unreasonable terms is an unlawful refusal to deal. See Fishman v. Wirtz, 807 F.2d 520, 450 (7th Cir. 1986); Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174, 179-180 (2d Cir. 1990), cert. denied, 500 U.S. 936 (1990).

The inability to access rooftops, on reasonable terms significantly diminishes wireless CLECs' ability to compete with incumbent local exchange carriers ("ILECs").

This proceeding, therefore, presents the Commission with an opportunity to continue its commitment to bring competition to the local loop and the benefits thereof to all consumers. In pursuit of that goal, the Commission must interpret Section 224 to ensure that telecommunications carriers including wireless CLECs have full access to rights-of-way -- including rooftop rights-of-way -- held by utilities<sup>6</sup> and that such access is on reasonable rates, terms, and conditions. Such actions will permit wireless CLECs to flourish, leading to vibrant competition in the local loop and other telecommunications services. In turn, the introduction of competition should provide numerous public welfare benefits to consumers.

**II. THE TERM "RIGHTS-OF-WAY" IN SECTION 224 MUST INCLUDE ROOFTOP ACCESS.**

Section 224 expressly mandates that utilities provide telecommunications carriers "with nondiscriminatory access to . . . any right-of-way." The Commission has concluded appropriately that the "access and reasonable rate provisions of Section 224 are applicable where a . . . telecommunications carrier seeks to install facilities in a right-of-way but does not make a physical

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<sup>6</sup> The term "utility" is defined in Section 224(a)(1), 47 U.S.C. § 224(a)(1), of the Communications Act as any local exchange carrier or electric, gas, water, steam or other public utility who owns or controls poles, ducts, conduits, or rights-of-way.

attachment to any pole, duct or conduit."<sup>7</sup> Although the statute does not define a "right-of-way," it does make clear that access was to be given to "any" right-of-way -- public or private<sup>8</sup> -- "owned or controlled" by a utility.<sup>9</sup>

The Commission should interpret the term "rights-of-way" to include -- at a minimum -- all rights-of-way held by utilities including those for access to rooftops, and other like access points.<sup>10</sup> That definition will permit wireless CLECs to build out their networks swiftly and on a playing field level with the ILECs. A narrower definition, on the other hand, would diminish the prospect of competition from wireless CLECs because such CLECs will be put to the extensive time and expense of obtaining rooftop access by negotiating building-by-building.

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<sup>7</sup> See Notice at ¶ 42.

<sup>8</sup> It should be uncontroverted that Congress' use of the term "rights-of-way" without qualifiers indicates that the term encompasses both public and private rights of way. Congress was well aware of the fact that rights-of-way may be public (for use by all) or private (limited to a particular person or class of persons). This is clearly evidenced by Section 253(c)'s preservation of State and local authority over "public rights-of-way." That Congress placed no limiting qualifier before the term "rights-of-way" in Section 224 demonstrates its intent that such rights-of-way include both public and private rights-of-way.

<sup>9</sup> See 47 U.S.C. §§ 224(a)(4) & (f)(1).

<sup>10</sup> In the marketplace, rooftops and other access points are treated as rights-of-way.

**A. Rooftop Access Constitutes An Essential Facility For The Provision Of Wireless Local Exchange Service.**

The Commission's definition of "rights-of-way" should be informed by the fact that rooftop access is an "essential facility" for the provision of wireless local exchange services. Under the antitrust laws, a facility is "essential" if a potential competitor could not feasibly duplicate the facility and if refusal of access precludes entry into the market."<sup>11</sup> As discussed above, WinStar and other wireless carriers must have rooftop access in order to provide their services to a particular building (i.e., signals can be transmitted between locations only via rooftops). Without rooftop access, wireless CLECs have absolutely no means of providing their service to customers and potential customers in a given building. For similar reasons, the Common Carrier Bureau has noted that "[u]tility poles ducts, and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems."<sup>12</sup> Consequently, much like access to poles, ducts, and

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<sup>11</sup> See City of Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992). See also Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978) (holder of essential facility has the power to prohibit entry into the market). The seminal "essential facilities" case is United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912) in which the Supreme Court required a group of railroads to make available access to their terminal to all competitors on just and reasonable terms as the bridge was the sole means of access to the city.

<sup>12</sup> See Public Notice DA 95-35, Common Carrier Bureau Cautions Owners of Utility Poles (Jan. 11, 1995).



conduits, access to rights-of-way constitutes an essential facility.

**B. The Term "Rights-Of-Way" Must Be Interpreted As The Full Easement Or Like Right Held By The Utility.**

The term "rights-of-way" must be interpreted to include the full panoply of access rights held by the utility. Anything less would frustrate Congress' intent as it would provide CLECs with rights smaller than those held by ILECs and utilities.

It is well-established that a "right-of-way" typically refers to a right to "pass over the land of another" and is considered to be an easement.<sup>13</sup> That definition has been adopted by, among others, the D.C. Circuit,<sup>14</sup> the Federal Circuit,<sup>15</sup> the Court of Claims,<sup>16</sup> various federal district courts,<sup>17</sup> and

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- <sup>13</sup> See 25 Am. Jur 2d, Easements and Licenses § 7. See also Blacks Law Dictionary 425 (3d ed. 1991)(defining right-of-way as "an easement for passage or access upon or across the lands of another).
- <sup>14</sup> See The Wilderness Society v. Morton, 479 F.2d 842, 853-54 (D.C. Cir. 1973) (en banc) (right-of-way includes any "right of passage over another person's land" including revocable permits, revocable licenses, and easements).
- <sup>15</sup> See Board of County Supervisors v. U.S., 48 F.3d 520, 527 (Fed. Cir. 1995) ("'Rights-of-way' are another term for easements, which are possessory rights in someone else's fee simple estate."), cert. denied, 133 L. Ed. 2d. 24 (1995).
- <sup>16</sup> See Del Rio Drilling Programs, Inc. v. U.S., 35 Fed. Cl. 186, 191 (1996) (Right-of-way is "an easement for passage or access upon or across the lands of another.") (quotation omitted).
- <sup>17</sup> See Columbia Gas Transmission Corp. v. Savage, 863 F. Supp. 198, 199 n.1 (M.D. Pa. 1994) ("A right-of-way, is an easement."); Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528, 1534 (E.D. Cal. 1992) (same); Lethin v. U.S., 583 F. Supp. 863, 871 (D. Or. 1984) (same); Wells v. Air Prds.

numerous state courts.<sup>18</sup> Thus, for example, the Supreme Court has noted that an easement by necessity is a right-of-way.<sup>19</sup> Of course, "[s]ome rights-of-way are held in fee simple."<sup>20</sup> Regardless, whenever a utility has a right to pass over or otherwise access a building via an easement or other right-of-way, it should be uncontroverted that such right of access also accrues to telecommunications carriers such as wireless CLECs pursuant to Section 224.

This conclusion is buttressed by the Bureau of Interior's regulations governing rights-of-way over public lands.<sup>21</sup> Section 2800.0-5(g) defines a "right-of-way" as "the public lands authorized to be used or occupied pursuant to a right-of-way grant." In turn, Section 28.00.0-5(h) defines a right-of-way grant as "an instrument issued pursuant to [statute] . .

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and Chemicals, Inc., 383 F. Supp. 146, 148 (N.D. W.Va. 1974) (same) .

<sup>18</sup> See, e.g., Nerbonne, N.V. v. Fla. Power Corp., 692 So.2d 928, 929 n.1 (Fla. App. 1997) (conveyance of a "right-of-way is generally held to create only an easement"); Ryder v. Petrea, 416 S.E.2d 686, 688 (Va. 1992) (same). State courts also have found that deeds that convey a right-of-way should be construed to provide only an easement. See, e.g., Brown v. Wash., 924 P.2d 908 (Wash. 1996); Crum v. Butler, 601 So.2d 834 (Miss. 1992); Brown v. Penn Central Corp., 510 N.E.2d 641 (Ind. 1987); Meyerink v. Northwestern PSC, 391 N.W.2d 180 (S.D. 1986) .

<sup>19</sup> See Leo Sheep Co. v. U.S., 440 U.S. 668, 679 (1979) ("These rights-of-way are referred to as 'easements by necessity.'") .

<sup>20</sup> See Preseault v. ICC, 494 U.S. 1, 16 (1990) .

<sup>21</sup> See 43 C.F.R. § 28.00.0, et. seq.

.authorizing the use of a right-of-way over, upon, under or through public lands for construction, operation, maintenance and termination of a project." (emphasis added). The generous scope of rights-of-way is demonstrated by use of the phrase "over, upon, under or through public lands"<sup>22</sup> and by the fact that rights-of-way are to be granted for a multitude of purposes including:

(1) reservoirs, canals, ditches . . . pipes and other facilities for the impoundment, storage, transportation or distribution of water;

(2) pipelines and other systems for the distribution of [certain] liquids and gases . . . and for storage and terminal facilities in connection therewith;

(3) pipelines, emulsion systems, and conveyor belts for transportation and distribution of solid materials and facilities for the storage of such materials;

(4) systems for generation, transmission and distribution of electric energy; and

(5) "[s]ystems for transmission or reception of radio, television, telephone, telegraph and other electronic signals, and other means of communications."<sup>23</sup>

It should be noted that the term "land" or "lands" does not mean that "rights-of-way" do not permit access to buildings, rooftops, and other structures. "The word 'land' includes not only the soil but everything attached to it, whether attached by the course of nature, . . . or by human hands, as buildings, fixtures and fences."<sup>24</sup> As noted in Black's Law Dictionary, land

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<sup>22</sup> See 43 C.F.R. §§ 2800.0-1 & 28.00.0-7(a)(5) (emphasis added).

<sup>23</sup> See 43 C.F.R. §§ 2800.0-7 (emphasis added).

<sup>24</sup> See 63C Am Jur 2d Property § 12.

includes "anything that may be classed as real estate or real property" as well as rights in use of the airspace above the actual property.<sup>25</sup>

**C. A Utility Need Not Be Using Its Rooftop Rights-Of-Way As A Precondition For Such Use By A Telecommunications Carrier Under Section 224.**

With respect to rooftop access, the utility need not actually be accessing the roof in order for a telecommunications carrier to do so under Section 224; it is enough if the utility possesses a right-of-way or easement which would permit such access.<sup>26</sup> It is black-letter law that an easement holder is entitled to utilize technological improvements as are reasonably necessary to carry out the purpose of the easement provided that such new use is substantially compatible with the right-of-way and does not substantially burden the servient estate (the property containing the easement).<sup>27</sup>

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<sup>25</sup> Blacks Law Dictionary 877 (6th ed. 1990).

<sup>26</sup> See, 39 Am Jur 2d Highways, Streets and Bridges § 196 ("public easement in a highway or street is not limited to its surface but extends both upward and downward for a distance sufficient to accommodate as well as to protect all proper uses to which the way is subject.")

<sup>27</sup> See C/R TV, Inc. v. Shannondale, Inc., 27 F.3d 104, 108 (4th Cir. 1994); see also 25 Am Jur 2d Easements and Licenses § 86 (right of way may be used by its holder "in availing himself of all modern improvements of the age."); see also 39 Am Jur 2d Highways, Streets, and Bridges § 195 ("It is settled law that the easement of the public in a highway is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility . . . of which may afterward be discovered . . . . It is not material that these new and improved methods . . . are more onerous to [the owner of the land] than those [previously] in use.").

In C/R TV, Inc., for example, the Fourth Circuit found that the common law right of easement holders to utilize technological improvements allowed a power company to string television transmission cables even though its easement permitted it only to "string electrical power and telephone wires."<sup>28</sup> Since the power company was entitled to string television cables (even though it was not so doing), the court held that a cable company -- which had acquired rights to use the power company's poles -- could likewise string television cables. In sum, the court concluded that the cable company stood in the shoes of the easement holder power company and could exercise those rights held (but not necessarily used) by the easement holder. Such rights likewise accrue to telecommunications carriers under Section 224.

Finally, there should be no doubt that an easement holder is entitled to erect structures such as antennas upon the easement or right-of-way. The Fourth Circuit has held that the placement of an additional wire on a pole "does not impose any meaningful increase in the burden" on the property owner.<sup>29</sup> Indeed, easements have been found to permit the holder to lay underground pipes,<sup>30</sup> maintain a telegraph across another's property,<sup>31</sup> hang a

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<sup>28</sup> Id. at 108-110.

<sup>29</sup> Id. at 109 ("The fact that an additional wire would be introduced to many others on the poles does not impose any meaningful increase in the burden on Shannondale's interest in the underlying property.").

<sup>30</sup> See 25 Am. Jur 2d, Easements and Licenses § 7.

sign on another's wall,<sup>32</sup> erect various buildings and structures necessary for the functioning of a railroad<sup>33</sup> and to construct a wharf.<sup>34</sup> Thus, the placement of small dishes and antennas by the utility should not be considered an incompatible use.<sup>35</sup> Since the utility would have the right to place such equipment, so too would telecommunications carriers pursuant to Section 224.

**III. THE COMMISSION MUST SET FORTH A METHODOLOGY TO CALCULATE JUST AND REASONABLE RATES FOR RIGHTS-OF-WAY; SUCH DETERMINATIONS SHOULD NOT BE LEFT TO AN AD HOC COMPLAINT PROCESS.**

Section 224 requires utilities to make available their rights-of-way to telecommunications carriers. Given the essential nature of such access, the Commission should adopt a pricing methodology and not rely on an *ad hoc* complaint process.

As an initial matter, utilities -- and most definitely the ILECs -- are likely to be poor gatekeepers. They have every

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<sup>31</sup> Id. at § 11.

<sup>32</sup> Id. at § 12.

<sup>33</sup> See Missouri Pac. R.R. Co. v. 55 Acres of Land, 947 F. Supp. 1301, 1309-1310 (E.D. Ark. 1996) (noting that Arkansas Law defines "right-of-way" as "all grounds necessary for side tracks, turn-outs, depots, workshops, water stations, and other necessary buildings" and holding that an "intermodal facility" for the receipt and distribution of freight fell within the meaning of right-of-way).

<sup>34</sup> An easement affording access to a lake over land adjacent to the water may (even if silent) convey a right to install and use a dock from the right-of-way to the lake. See 79 Am Jur 2d, Wharves § 6.

<sup>35</sup> See C/R TV, Inc., 27 F.3d at 109 (placement of television cable wire is not incompatible with easement permitting the stringing of telephone cable).

incentive to delay the advent of competition by new entrants. Indeed, the Commission has observed that a "utility that itself is engaged in . . . telecommunications services has the ability and incentive to use its control over distribution facilities to its own competitive advantage."<sup>36</sup> In analogous circumstances, the Commission has recognized that regulation is needed to ensure that new entrants' agreements do not unfairly reflect the greater market power of the incumbent monopolist or oligopolist carriers.<sup>37</sup> Price regulation is the proper solution here as well.

A pricing formula would also obviate another problem which would arise in the absence of a formula, namely, that telecommunications carriers such as WinStar would be required to bargain over access prices on a building-by-building basis. Even if such negotiations could be conducted fairly and swiftly (which is most likely not the case), the sheer number of negotiations would slow the rapid development of wireless telephony, thereby depriving the public of at least one potential competitor to the ILECs. Wireless CLECs would be placed between the proverbial

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<sup>36</sup> See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 16071 (1996).

<sup>37</sup> See Uniform Settlements Policy, 51 Fed. Reg. 4736, 4742 ¶ 24 (1986) (absent FCC regulation, operating agreements would more directly reflect foreign monopolists' market power); Domestic Public Messaging Service, 73 FCC.2d 151 ¶ 30 (1979) (eliminating contract clauses required by oligopolists as a result of their superior bargaining power as compared to a potential new entrant "dependent on them for any substantial share [of business]").

rock and hard place: endure lengthy negotiations and a complaint process to possibly obtain a fair price or gain swift access by paying unreasonable rents.<sup>38</sup>

A bright line generic formula, in contrast, would permit wireless CLECs to swiftly obtain access without the delays and difficulties associated in bargaining with the utilities. Indeed, at the heart of the essential facilities doctrine is the recognition that such facilities are properly subject to rate regulation.<sup>39</sup> Moreover, the lengthy negotiations over price that would ensue under an *ad hoc* complaint process would be curtailed significantly with the creation of the Commission's formula. A Commission-promulgated formula would have the additional benefit of conserving Commission resources as it would reduce the need for *ad hoc* agency determinations over the reasonableness of right-of-way prices. Indeed, whatever benefits might arise from

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<sup>38</sup> The Common Carrier Bureau has noted that the development of cable television facilities could be hindered by unreasonable conduct on the part of utility pole owners. See "Common Carrier Bureau Cautions Owners of Utility Poles," DA 95-35, *Public Notice*, (rel. Jan 11, 1995). Likewise, utilities could stymie the growth of wireless local exchange facilities.

<sup>39</sup> Justice (then-Judge) Breyer has noted that "regulators . . . have the expertise needed to administer the [essential facilities] doctrine [as they] have a staff, for example, capable of finding facts related to rates." See Hon. Stephen Breyer, "The Cutting Edge of Antitrust: Lessons From Deregulation," 57 *Antitrust L.J.* 775 (1989). See also MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir.) ("the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms"), cert. denied, 464 U.S. 891 (1983).



an *ad hoc* complaint process would be dwarfed by anticompetitive behavior on the part of the rights-of-way holders. In sum, a Commission-promulgated formula would stimulate competition in the local exchange by reducing entry barriers associated with the pricing of rooftop access.

**IV. THE FORMULA FOR RIGHTS-OF-WAY MUST ENSURE THAT PRICES ARE JUST AND REASONABLE AND NONDISCRIMINATORY.**

Section 224 requires that rates for accessing rights-of-way be "just and reasonable."<sup>40</sup> In the Notice, the Commission found that the "access and reasonable rate provisions of Section 224 are applicable where a . . . telecommunications carrier seeks to install facilities in a right-of-way but does not make a physical attachment to any pole, duct or conduit."<sup>41</sup> Thus, the pricing for access to rights-of-way must be just, reasonable, and nondiscriminatory.<sup>42</sup>

At bottom, the Commission's formula must be easy to apply and, more importantly, result in just and reasonable prices. Ease of application is critical as a cumbersome formula might lead to very ills it seeks to avoid - lengthy debates and complaints over the proper application of the formula. That the formula must yield reasonable prices is a product of both the statute itself and common sense. Simply put, this goal would be

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<sup>40</sup> See 47 U.S.C. §§ 224(b)(1) & (e)(1).

<sup>41</sup> See Notice at ¶ 42.

<sup>42</sup> Section 224(f)(1) requires that access to rights-of-way be provided on a nondiscriminatory basis. That admonition should extend to pricing as well.

realized by ensuring that rates are cost-based and do not require the telecommunications carrier to pay more than its proportionate share of the cost to the utility of maintaining the right of way.<sup>43</sup>

## V. CONCLUSION.

In conclusion, WinStar urges the Commission to define rights-of-way so as to make the full access rights held by utilities available to telecommunications carriers and to adopt mechanisms designed to ensure that access to rights-of-way are made available at just and reasonable prices.

Respectfully submitted,

Philip L. Verveer

Timothy Graham  
Robert Berger  
Joseph Sandri, Jr.

**WINSTAR COMMUNICATIONS, INC.**  
1146 19th Street, N.W.  
Suite 200  
Washington, D.C. 20036  
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**WILLKIE FARR & GALLAGHER**  
Suite 300  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20036  
(202) 328-8000

Attorneys For WinStar  
Communications, Inc.

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<sup>43</sup> It is not at all clear that existing methodologies for pole attachments are appropriate for rights-of-way. Poles, for example, are far more susceptible of space and other numeric calculations (i.e., it is not difficult to determine the size of the pole and the number of wires it can hold) than are rights-of-way. That said, the principles of cost-based pricing are as relevant to rights-of-way as to poles.